

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>AARON SHANE KING</b>	)	
Claimant	)	
VS.	)	
	)	
<b>AVERY DENNISON AUTOMOTIVE DIVISION</b>	)	Docket No. 1,014,825
	)	
Respondent	)	
AND	)	
	)	
<b>FIDELITY &amp; GUARANTY INS. CO.</b>	)	
Insurance Carrier	)	

<b>AARON SHANE KING</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SHARPLINE CONVERTING, INC.</b>	)	Docket No.1,020,000
	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent Avery Dennison Automotive Division and its insurance carrier (Avery) requested review of the November 21, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on February 15, 2008. Phillip B. Slape, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for Avery. Ryan D. Weltz, of Wichita, Kansas, appeared for respondent Sharpline Converting, Inc., and its insurance carrier (Sharpline).

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment with Avery on December 18, 2003. The ALJ was persuaded that claimant's complaints are a natural and probable consequence of his original work injury at Avery and not a result of a new accident or an aggravation of condition during the time claimant worked for Sharpline. The ALJ also

found that the opinion of Dr. George Flutter best reflected the facts stipulated to and determined by the court. Accordingly, the ALJ concluded that claimant sustained a 7 percent permanent partial impairment to the right upper extremity and a 9 percent permanent partial impairment to the left upper extremity, and found that the entire award was the responsibility of Avery in Docket No. 1,014,825. The ALJ denied benefits to claimant in Docket No. 1,020,000.

The ALJ also found that an error was made in the calculation of temporary total disability benefits, and that claimant reimbursed respondent the amount of \$2,359.07 for an overpayment of those benefits. However, the ALJ computed that claimant overpaid his reimbursement in the amount of \$335.32, and that amount was ordered reimbursed to claimant.

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

Avery admits liability for claimant's initial right shoulder injury that occurred on December 18, 2003, when claimant was working for Avery. However, Avery contends claimant suffered an aggravation to his right shoulder condition and injury to his left shoulder arising out of and in the course of his subsequent employment with Sharpline. In the alternative, Avery asserts that claimant engaged in activities and sustained a new and distinct, noncompensable injury outside of his employment. Avery argues that any finding by the Board that claimant suffered an aggravation or injury outside of his employment with Avery terminates its responsibility to provide workers compensation benefits for claimant's shoulders.

Avery also argues that in determining the nature and extent of claimant's impairment, the Board should adopt the opinions of Dr. Pat Do, claimant's authorized treating physician, who concluded that claimant suffered a 5 percent permanent partial impairment to his right upper extremity at the level of the shoulder and a 5 percent permanent partial impairment to his left upper extremity at the level of the shoulder. Avery contends that Dr. Flutter did not use the AMA *Guides*<sup>1</sup> in rating claimant's impairment. In the alternative, Avery requests that the Board accept the opinions of Dr. Paul Stein, who concluded that claimant suffered a 1 percent permanent partial impairment to his right upper extremity at the level of the shoulder and a 3 percent permanent partial impairment to his left upper extremity at the level of the shoulder.

---

<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Sharpline argues that claimant suffered injuries to both his shoulders on December 18, 2003, and all subsequent symptoms and treatment were a direct and natural consequence of those injuries. Sharpline further argues that there is no evidence that claimant suffered an aggravation or new injuries to his shoulders while working for Sharpline. Accordingly, Sharpline requests the Board affirm the Award of the ALJ.

Claimant argues that the rating of Dr. Do should be disregarded because he did not examine claimant or measure his range of motion but instead used measurements from an old examination done when claimant was heavily medicated. Claimant further argues that Dr. Stein admitted that the AMA *Guides* direct that other methods should be used when the range of motion does not adequately represent claimant's injury, and that Dr. Stein admitted that although claimant had near full range of motion, he had other issues due to his shoulder injuries. Instead, claimant argues that Dr. Fluter provided the better rating in this case.

The issues for the Board's review are:

(1) Did claimant sustain an aggravation of his December 18, 2003, injury while working for Sharpline? If so, did that aggravation constitute a new accident and injury to either or both of claimant's shoulders or, instead, was that aggravation a direct and natural consequence of claimant's original December 18, 2003, injury?

(2) Did claimant suffer a new distinct, noncompensable injury outside of his employment after his December 18, 2003, injury?

(3) What is the nature and extent of claimant's disability?

(4) What is the liability of each respective respondent/insurance carrier?

#### **FINDINGS OF FACT**

Claimant worked for respondent Avery as a roll stripe operator, making pin stripes for vehicles by cutting vinyl down to smaller sizes. On December 18, 2003, claimant was tearing down some pallet shelving when a 30-35 pound beam fell into his arms. His natural reflex was to catch it. However, when the beam hit his arms, claimant heard a sound like fabric ripping in his right arm. He notified his supervisor of the accident the next day. Avery's last day of operation was December 31, 2003. Some of its assets were purchased by Sharpline, including the roll stripe line.

Claimant did not work during the months of January and February 2004, but went to work for Sharpline on March 15, 2004. When he was hired at Sharpline, he told the human relations personnel that he had an injury but he thought it was about resolved. His job at Sharpline was as a production floater, but he primarily worked as a roll stripe

operator. His work at Sharpline was basically the same as the work at Avery, but the configuration of the machines caused him to perform more over the shoulder and overhead lifting. He was also required to occasionally lift up to 80 pounds.

Claimant was unable to get in to see a doctor until December 30 or 31, 2003, when he saw his family physician, Dr. Willy Pereira. He was having pain in both shoulders, but the pain in his right shoulder was much more painful than his left. Claimant was treated by Dr. Pereira until Dr. J. Mark Melhorn was authorized as his treating physician.

Dr. Melhorn is board certified in general orthopedics with an additional certification in hand and upper extremities. He first saw claimant on March 9, 2004, in regard to injuries from a work-related accident. At that time, claimant's chief complaint was severe right shoulder pain with loss of strength and range of motion. Claimant also complained of pain to his left shoulder to a lesser extent than on the right. Dr. Melhorn diagnosed claimant with painful shoulder, right greater than left; right shoulder superior labrum anterior-posterior (SLAP), type four; right shoulder impingement; and right shoulder partial rotator cuff tear. He did not make a diagnosis of the left shoulder at the time of his initial evaluation, other than it was painful. He recommended treatment consisting of education with regard to the diagnosis, modification of activities, exercise, anti-inflammatory medication, and follow-up with possible injection. He restricted claimant's hand-over-shoulder activities because claimant would have had a difficult time improving or healing if the arm was brought up in an abducted external rotation pattern.

Dr. Melhorn continued to treat claimant through 2004. By October 21, 2004, claimant complained that the symptoms in both shoulders had increased. Claimant indicated that he worked at Sharpline, that he lifted 80-pound rolls of vinyl, and that he did a lot of overhead reaching, lifting 25- to 30-pound rolls of vinyl to put on a spindle. Dr. Melhorn opined that claimant's work activities at Sharpline contributed to the increase in his symptoms. Dr. Melhorn was still trying to treat claimant conservatively and recommended that claimant return to his physical activity exercise and strengthening program. He admitted there had been no improvement in claimant's condition with the conservative treatment. Dr. Melhorn again saw claimant on November 18, 2004. However, claimant became frustrated with his lack of improvement and requested a change of physicians. Eventually, Dr. Pat Do was authorized as his treating physician.

Dr. Do, a board certified orthopedic surgeon, initially treated claimant on May 24, 2005. Claimant gave him a history of being injured trying to catch a falling beam. His injuries were to both his shoulders, with his right being worse than the left. Dr. Do reviewed an MRI scan of claimant's right shoulder and performed a physical examination. His findings were that claimant had weakness of the rotator cuff musculature, popping in his shoulder, and impingement signs bilaterally. Dr. Do said claimant definitely had popping in his right shoulder and possibly in his left shoulder. After discussing treatment options, claimant chose to undergo right shoulder surgery. On June 20, 2005, Dr. Do performed

a right shoulder arthroscopy, removing bone spur, fixing the rotator cuff, and smoothing out the torn tissue. After surgery, claimant had physical therapy.

On September 12, 2005, claimant had surgery on his left shoulder, which consisted of a decompression, rotator cuff repair, and a biceps tenodesis. Dr. Do released claimant from care on February 20, 2006. At that time, Dr. Do believed that claimant had suffered permanent impairment as a result of the injuries to his shoulders. Based on the *AMA Guides*,<sup>2</sup> Dr. Do opined that claimant suffered a 5 percent permanent partial impairment to his right shoulder and a 5 percent permanent partial impairment to his left shoulder.

The only history of injury given by claimant to Dr. Do was the injury in December 2003. On that date, there was a traumatic injury to both claimant's shoulders. Because claimant did not have immediate surgery on the tears in his shoulders, he would have remained symptomatic after the tears occurred. He stated that even given the fact that there was a specific traumatic injury in December 2003, this type of injury can be aggravated by job activities such as working overhead and lifting weights.

Claimant returned to see Dr. Do in February 2007, several months after he had last been seen. Dr. Do provided additional treatment at that point and recommended injections. When Dr. Do saw claimant in February 2007, his main complaints were in his left shoulder. Dr. Do had indicated to claimant both before and after his surgeries that he was going to continue to have some problems with his shoulders. The record does not establish that Dr. Do provided claimant with any permanent work restrictions after the surgeries.

Dr. George Flutter, a board certified independent medical examiner who is also board certified in physical medicine and rehabilitation and in internal medicine, examined claimant two times, both at the request of claimant's attorney.

Claimant's first visit with Dr. Flutter was on November 10, 2004, at which time he complained of constant pain affecting his right and left shoulders and his low back. He described the pain as aching and burning. Lying down, standing, exercise, and sometimes medication made the pain worse. After strenuous work or lifting, his arm became weak. When he relaxed later, his arms would hurt badly with burning and aching. He told Dr. Flutter that lately, his right shoulder had been popping. Sometimes with lifting, his shoulder would get stuck, and he would have to rest and massage his muscles until they relaxed. Claimant reported to Dr. Flutter that he had been using his left arm more to compensate for the problems with his right arm and believed this contributed to his left shoulder pain.

---

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On examination, Dr. Fluter diagnosed claimant with right shoulder superior labral tear with extension into the biceps tendon, right shoulder Type IV SLAP lesion, partial tear of the right supraspinatus tendon, and left shoulder pain due to overuse. He found there was a causal relationship between claimant's current condition and his injury of December 18, 2003. He recommended that claimant restrict lifting, carrying, pushing, and pulling to 10 pounds occasionally and negligible weight frequently using the right arm, avoid activities at or above shoulder level, and avoid activities requiring forceful supination of the right forearm.

Dr. Fluter recommended that claimant be evaluated by an orthopedic surgeon specializing in shoulder and arm conditions. He also recommended a trial of medications, a corticosteroid injection into the right shoulder, and consideration of physical therapy before a decision regarding surgical intervention.

Dr. Fluter stated that it was possible that claimant's job duties at Sharpline aggravated the underlying conditions claimant had as a result of the injury of December 18, 2003.

Claimant next saw Dr. Fluter on April 26, 2006. Since claimant had last been seen, he had undergone right shoulder surgery in June 2005 and left shoulder surgery in September 2005. The surgeries were followed by postoperative therapy. Claimant had been released from care with no specific restrictions. He took over-the-counter Ibuprofen, two tablets two or three times a day. Claimant reported that his overall condition was better following the surgeries. He said his right sided pain essentially resolved following surgery, but he continued to have pain on the left. He also reported that his muscle endurance was not good. He continued to work with no specific restrictions.

Upon examination, Dr. Fluter diagnosed claimant with status post right shoulder arthroscopic subacromial decompression and rotator cuff repair; status post left shoulder arthroscopy with debridement of the labrum and biceps tenodesis, left shoulder arthroscopic subacromial decompression, and mini-open rotator cuff repair; status post Type IV SLAP lesion and partial tear of the supraspinatus tendon, right shoulder; and status post massive rotator cuff tear, left shoulder. He continued to opine that there was a causal connection between claimant's reported injury of December 18, 2003, and his condition.

Based on the *AMA Guides*, Dr. Fluter rated claimant as having a 2 percent permanent partial impairment for range of motion deficits to his right shoulder and an impairment to the left shoulder of 4 percent for range of motion deficits. Although not specifically addressed in the *AMA Guides*, Dr. Fluter found that claimant had a right upper extremity impairment of 5 percent following the surgery, and a 5 percent impairment to his left upper extremity following surgery. Dr. Fluter computed claimant's impairment to the right upper extremity as 7 percent and impairment to the left upper extremity as 9 percent.

Dr. Fluter said there is not a specific table in the *AMA Guides* that references arthroscopic surgery, subacromial decompression and rotator cuff repair. Claimant had rotator cuff repair surgery, and he had subacromial decompression on his right shoulder, so he had some structural changes take place as a result of the surgeries that would only partially be reflected in his lack of range of motion. Dr. Fluter used his years of experience and his education to arrive at a permanent impairment rating as it relates to the right shoulder for the decompression and rotator cuff repair. Likewise, Dr. Fluter used his experience and education to arrive at a permanent partial impairment rating as it relates to claimant's left shoulder for the arthroscopy with debridement of the labrum and bicep tenodesis, and the subacromial decompression.

Dr. Fluter recommended that claimant restrict lifting and carrying to 50 pounds occasionally and 20 pounds frequently, restrict pushing and pulling to 40 pounds occasionally, and restrict activities at or above shoulder level with each arm to an occasional basis.

Dr. Paul Stein, a board certified neurosurgeon, saw claimant on April 20, 2007, at the request of Sharpline. Claimant stated he currently has some occasional discomfort in his right shoulder but, for the most part, he was happy with his right shoulder. He still had significant discomfort in his left shoulder extending into the biceps tendon. On occasion, he has discomfort in the area of the distal biceps tendon. His left shoulder pain is most often triggered by activity.

Dr. Stein opined that claimant sustained bilateral shoulder injuries, with the right shoulder initially being considerably worse. The left shoulder symptoms increased with excessive use. After surgery, the right shoulder is almost asymptomatic. Claimant was at maximum medical improvement.

Using the *AMA Guides*, range of motion method, Dr. Stein rated claimant as having a 1 percent permanent partial impairment to the right shoulder and a 3 percent permanent partial impairment to the left shoulder. He recommended that claimant avoid intensive repetitive work activities with either upper extremity above shoulder level and avoid lifting more than 50 pounds above chest level.

#### **PRINCIPLES OF LAW**

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>3</sup>

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....  
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

.....  
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Logsdon*,<sup>4</sup> the Kansas Court of Appeals stated:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Workers's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence

---

<sup>3</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>4</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether his subsequent work activity at Sharpline aggravated, accelerated, or intensified the underlying disease or affliction.<sup>5</sup> However, every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*<sup>6</sup>, the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*<sup>7</sup>, the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*<sup>8</sup>, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975,

---

<sup>5</sup> See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

<sup>6</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>7</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>8</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*<sup>9</sup>, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."<sup>10</sup>

### ANALYSIS

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. As noted by the ALJ, claimant's right shoulder injuries were diagnosed before he went to work for Sharpline, and claimant's left shoulder symptoms were also well documented. To the extent claimant's left shoulder symptoms worsened during the time claimant worked for Sharpline, it was due to claimant's trying to protect and compensate for his right shoulder injury. Thereafter, claimant's bilateral shoulder condition never improved. Although claimant had not been released to regular duties by his treating physician, it appears that claimant's job duties with Sharpline exceeded his temporary restrictions. Claimant testified he experienced continued pain when he returned to work for his new employer.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, the Board finds that claimant's condition did arise out of his employment with Avery and is a natural consequence of the original injury with Avery. Accordingly, the Board affirms the ALJ's Order.

The Board likewise agrees with and affirms the ALJ's conclusion that Dr. Fluter's rating is the most credible, as it includes all of claimant's injuries and functional impairments. K.S.A. 44-510d(a) permits the medical examiner to go outside the AMA *Guides* and utilize the examiner's training and experience in rating impairments that are not contained within those *Guides*.

---

<sup>9</sup> *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

<sup>10</sup> *Id.* at 728.

**CONCLUSION**

(1) Claimant did aggravate his bilateral shoulder injuries while working at Sharpline, but those injuries were a natural consequence of the prior accident and injuries claimant sustained while working for Avery.<sup>11</sup>

(2) Claimant did not suffer a new non-industrial injury outside his employment that would terminate the liability of either respondent.

(3) Claimant suffered a 7 percent permanent partial disability to his right shoulder and a 9 percent permanent partial disability to his left shoulder.

(4) Respondent Avery Dennison Automotive Division and Fidelity & Guaranty Insurance Company are liable for claimant's injuries and award.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 21, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2008.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant  
Dallas L. Rakestraw, Attorney for Respondent Avery and its Insurance Carrier  
Ryan D. Weltz, Attorney for Respondent Sharpline and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

---

<sup>11</sup> See *Logsdon*, *supra* note 4.